SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1944**

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# No. 468

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DEBS MEMORIAL RADIO FUND INC. AND HENRY GREENFIELD,

*Petitioners,*

*vs.*

ASSOCIATED MUSIC PUBLISHERS, INC.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

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A. WALTER SOCOLOW,
*Counsel for Petitioners.*

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DEBS MEMORIAL RADIO FUND INC. AND HENRY GREENFIELD,

*against* *Petitioners,*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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*To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioners respectfully show:

### Summary Statement of the Matter Involved

In this action a summary judgment was entered in the United States District Court for the Southern District of New York against petitioners for infringement of copyright of a non-dramatic musical composition by the broadcast performance thereof over Radio Station WEVD located in New York City and owned and operated by petitioner Debs

Memorial Radio Fund, Inc. (hereinafter referred to as "Debs") (Fol. 167). Debs is a non-profit corporation engaged in philanthropic and educational pursuits (Fols. 186-205, 360, 362, C. C. A. opinion, R. 135-6).

Prior to 1931 Debs was subsidized by donations solicited from the public at large (Fol. 360, C. C. A. opinion, R. 135). Its operations were thereafter financed by advances and donations from the Forward Association, a membership corporation engaged in purely educational and cultural activities throughout the United States (Fols. 207-58, 359, C. C. A. opinion, R. 135). The stock of Debs is held by nominees of the Forward Association (Fols. 178, 369, C. C. A. opinion, R. 134-5). Such advances and donations were required to make up the large deficits which Debs sustained from the operation of Station WEVD which has at all times been its sole activity (Fols. 360-1, C. C. A. opinion, R. 135). To further its philanthropic and educational objects and to reduce its operating deficit, Debs found it necessary to make available to advertisers a limited use of its broadcasting time and facilities in order to derive some revenue and thus relieve its supporters of a part of the financial burden involved in its operations (Fol. 195). As was stated by the Circuit Court of Appeals for the Second Circuit, through Judge A. N. Hand:

> "Whatever may be the charter powers of Debs, we may assume that its ultimate objects, as it has been actually conducted, have been philanthropic and educational. In carrying out its purposes it has sought immediate commercial profit, even though the reason for doing this has been to forward its philanthropic program, and to obtain funds to achieve its objects it has given broadcasting time to advertisers." (R. 136)

No salaries or other compensation, directly or indirectly were ever paid to any of the officers, stockholders or di-

rectors of Debs and no dividends were ever declared or paid (Fols. 180, 334, 340, 361, C. C. A. opinion, R. 136).

Petitioner Henry Greenfield was employed as manager of Station WEVD and was held liable as a co-infringer.

The broadcast of a part of plaintiff's copyrighted work which is the subject of this action was performed by Debs on its regular musical program known as the "Symphonic Hour" (Fols. 170, 269) and was not a program sponsored or paid for by advertisers but was a so-called "sustaining" program furnished as a service to its listeners (C. C. A. opinion, R. 137). Debs derived no income whatsoever from this broadcast upon which a part of plaintiff's composition was performed (Fols. 267-8). Nevertheless, petitioners were found to have infringed plaintiff's copyright and summary judgment was entered against them in the United States District Court for the Southern District of New York on October 16th, 1942. Petitioners appealed to the United States Circuit Court of Appeals for the Second Circuit, which affirmed this judgment by its mandate of June 15th, 1944.

## Jurisdiction

This case arises under the United States Copyright Act and involves an important question of Federal law which has not been, but should be, settled by this Court (Supreme Court Rule 38 (5) (b)). The novel question involved herein is the interpretation of Section 1(e) of the Copyright Act of 1909, 35 Stat. 1075, insofar as it applies to non-profit, philanthropic and educational institutions. Section 1(e) provides:

> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right * * * (e). To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit."

Petitioners' liability can only be predicated upon the establishment of an express condition that the broadcast of plaintiff's musical work was "for profit". *Buck, et al.* v. *Jewell-La Salle Realty Co.*, 283 U. S. 191, 196 (1931). The word "for" in the phrase "for profit" indicates that the emphasis is on the "purpose" rather than the particular means whereby the purpose is achieved. *Herbert* v. *Shanley*, 242 U. S. 591 (1917). In order to find infringement it is necessary that "the purpose of the performance be for profit and not eleemosynary; it is against a commercial as distinguished from a purely philanthropic, public use of another's composition, that the statute is directed." *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. (2d) 411, 412.

In the instant case, it has been held that although Debs has operated Station WEVD as a philanthropic and educational service, the mere fact that a portion of its broadcasting time was utilized by advertisers resulting in revenue to Debs was sufficient to support a judgment for copyright infringement for the broadcast of plaintiff's musical work on a sustaining program from which no revenue was derived. The District Court imposed liability upon the theory that the broadcast of plaintiff's music was "for profit" because the sustaining program, though bringing in no direct revenue, helped to "build up listener appeal and in that way provide an inducement to advertisers" (Fol. 366, C. C. A. opinion, R. 137). In affirming, the Circuit Court of Appeals, through Judge A. N. Hand, stated (C. C. A. opinion, R. 138):

> "The fees for advertising are obtained in order to aid the broadcasting station to pay its expenses and repay the advances to it by the Forward Association. The 'sustaining' programs are similarly broadcast in order to maintain and further build up the listening audience and thus furnish the field from which the

paying advertisers may reap a profit. It can make no difference that the ultimate purposes of the corporate defendant were charitable or educational."

Petitioners contend that the courts below failed to make the distinction required by the decisions of this Court and by the facts in this case that the music must be performed in connection with *a business which is operated for profit* in order to be deemed an infringement. Every decision involving liability for copyright infringement of a non-dramatic musical work is rooted in the finding of fact that a defendant made a public performance of a copyrighted work *for profit*—in connection with a business which was operated for profit. In most of these cases, specific attention is called to the fact that the performances were not eleemosynary and in all decisions the profit motive is emphasized as a necessary element of an action for infringement.

In this case of first impression, the Circuit Court of Appeals expressly held that "it can make no difference that the ultimate purposes of the corporate defendant were charitable or educational" (R. 138). The basic fallacy in the reasoning of the Circuit Court improperly deprives petitioners of the express benefits under the Copyright Act which sanctions non-profit public performances of copyrighted works. The decision of the Circuit Court conflicts with the decisions of this Court and enlarges the statutory rights of the plaintiff beyond the intentions of Congress by permitting recovery of damages for non-profit performances, whereas the statutory right of plaintiff is expressly limited to protection against performance of its work for profit.

This Court is earnestly solicited to pass upon the important question herein raised because it materially affects all philanthropic, educational, eleemosynary and other non-profit organizations and because a fundamental principle

is involved herein which transcends the scope of this record. The mandate of the Circuit Court of Appeals was entered on the 15th day of June, 1944.

## Questions Presented

1. Does the doctrine of *Herbert* v. *Shanley*, 242 U. S. 591, apply to the performances of copyrighted non-dramatic musical works on sustaining radio programs by philanthropic and educational organizations which are not operated for profit?

2. Does the non-commercial broadcast to the public of a portion of a non-dramatic musical composition as part of a major educational program in the course of the philanthropic and educational activities of a non-profit radio station constitute an infringement of copyright because the non-profit organization incidentally derived revenue for its operations from a limited use of other periods of broadcast time for totally different and distinct programs in which the copyrighted work was not performed?

3. Does the performance of a portion of a non-dramatic musical work broadcast to the public as part of a major educational program by a non-profit, philanthropic and educational radio station constitute a public performance "for profit"?

## Specification of Errors

1. The Circuit Court erroneously affirmed summary judgment entered against petitioners for copyright infringement.

2. The Circuit Court erroneously interpreted the Copyright Act so as to afford plaintiff protection in a situation not permitted by said statute.

3. The Circuit Court erroneously construed the decision of this Court in *Herbert* v. *Shanley*, *supra*, to hold a philan-

thropic and educational organization which does not operate for profit liable for infringement of copyright of a non-dramatic musical work by reason of the broadcast of a portion thereof on a non-commercial sustaining program presented as a public service.

**Reasons Relied on for Allowance of Writ**

1. Congress did not intend that a charitable or educational organization should be held accountable for the performance of a copyrighted composition where such performance was not for profit but was in the pursuance of the charitable, cultural and educational purposes of such performer.

2. This Court did not intend its decision in *Herbert* v. *Shanley, supra,* to apply to the performance of a copyrighted composition by a non-profit organization where such performance was not made in connection with a business which is operated for profit.

3. The test applicable to the performance of a copyrighted non-dramatic musical work for profit is whether the performer is engaged in a business operated for profit. No question is raised herein as to the standard laid down in *Herbert* v. *Shanley* that no immediate profit need be derived from the particular performance so long as it is connected with the ultimate object of the performer to derive profit in the course of the conduct of a business. The instant action, however, does present totally different facts and circumstances from *Herbert* v. *Shanley* and requires the adoption of a completely different standard so as to exempt performers of non-dramatic musical works from liability for copyright infringement who perform such works solely for philanthropic and educational purposes. If the principle established herein by the Circuit Court of Appeals is allowed to remain as authority, then all charitable and

non-profit organizations which perform copyrighted musical works in connection with activities in the public welfare would be liable for copyright infringement merely because they derive some revenue to defray the cost of achieving their philanthropic and educational purposes. The principle established by the Circuit Court of Appeals may well extend to charging such non-profit organizations with new liabilities in other aspects of their operations unconnected with the performances of copyrighted musical works. The premise of the Circuit Court's decision is fundamentally unsound and the decision itself is illogical, illegal and untenable.

WHEREFORE, your petitioners pray that a writ of certiorari be issued under the seal of this Court directed to the Circuit Court of Appeals for the Second Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 149, October Term, 1943, "Associated Music Publishers, Inc., Plaintiff-Appellee, against Debs Memorial Radio Fund Inc., et al., Defendants-Appellants", to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Dated: September 11th, 1944.

A. WALTER SOCOLOW,
*Counsel for Petitioners,*
*Office & P. O. Address,*
*580 Fifth Avenue,*
*Borough of Manhattan,*
*City of New York.*

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1944**

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# No. 468

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DEBS MEMORIAL RADIO FUND INC. AND HENRY GREENFIELD,

*against* *Petitioners,*

ASSOCIATED MUSIC PUBLISHERS, INC.

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## BRIEF OF PETITIONERS IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI

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### Opinions Below

The opinion delivered by the United States District Court for the Southern District of New York is officially reported in 46 F. Supp. 829 and is printed in this record at page 119. The opinion delivered by the United States Circuit Court of Appeals for the Second Circuit is not officially reported as yet, but is printed in this record at page 133.

### Statutes Involved

This case arises under the United States Copyright Act. The novel question involved herein is the interpretation of Section 1(e) of the Copyright Act of 1909, 35 Stat. 1075, in-

sofar as it applies to non-profit, philanthropic and educational institutions. Section 1(e) provides:

> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right * * * (e). To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit."

## Preliminary Statement

The petitioners are defendants against whom a final summary judgment for copyright infringement was entered in the United States District Court for the Southern District of New York on October 16th, 1942, in favor of the plaintiff, which judgment was affirmed by the United States Circuit Court of Appeals for the Second Circuit by its mandate dated June 15th, 1944.

## Nature of the Action and Defenses Thereto

The action is the usual one for copyright infringement. The complaint alleges, in substance, that petitioner Debs Memorial Radio Fund Inc. (hereinafter referred to as "Debs") is the owner of Radio Station WEVD and that the individual petitioner Greenfield is its manager; and that petitioners infringed respondent's copyrighted musical composition by broadcasting a portion thereof over said Station (Fols. 7-18).

The District Court granted respondent's motion for summary judgment and the final judgment entered thereon was affirmed by the Circuit Court (R. 140).

## The Factual Situation as Revealed by the Proofs

Petitioner Debs was organized in 1927 as a permanent memorial to Eugene V. Debs, a pioneer labor leader (whose initials appear in the Station's call letters) for the sole purpose of establishing and maintaining an open public

forum for discussions of political, social and economic questions and for the promotion of civic, educational and cultural purposes generally (Fols. 171, 186, 244, 246-7, 341, C. C. A. opinion, R. 135). Although it obtained its charter under the New York Stock Corporation Law, its sole activity consists of the ownership and operation of Station WEVD for philanthropic and educational purposes (Fols. 167, 263, 360, C. C. A. opinion, R. 134-137).

All of the shares of stock are held by nominees of the Forward Association, a New York membership corporation engaged in cultural activities in the United States (Fols. 209-10, 237-40). All such stockholders—twenty-five in number—are persons prominent in the community (Fol. 178). No private capital has at any time been invested, directly or indirectly, in Debs. No private capital has at any time been loaned or advanced to it, directly or indirectly (Fols. 172, 334). The by-laws of petitioner Debs expressly provide (Fols. 183-4, C. C. A. opinion, R. 135) that "none of its stockholders and directors shall be entitled to share in the profits or surplus of the corporation" and that "all profits and surplus that may arise from the operation of the station shall be used for the purpose of enlarging and extending the facilities of the station and for the improvement of the educational and cultural activities of the station."

The Board of Directors are vested with discretionary authority to allocate out of the surplus of the station funds for "educational and cultural activities" to "non-profit sharing corporations or voluntary associations organized for educational and cultural purposes."

In accordance with the by-laws, no dividends have ever been paid and none can be paid by Debs or the Forward Association. No salaries or other compensation, direct or indirect, have ever been paid or are payable to any of the

officers, stockholders or directors (Fols. 183-4, 340, C. C. A. opinion, R. 136).

Until 1931, Debs was subsidized by donations solicited from the public and operated at a deficit (Fols. 172-3). The amount of such deficit caused the passage of a resolution by the Forward Association in August, 1931, under which advances were made to Debs for its operating purposes (Fols. 172-7). Since the passage of said resolution, the Forward Association has expended for or advanced to Debs the sum of $325,000.00 for the operations of Station WEVD, exclusive of a pledge of a donation amounting to $250,000.00 of which $100,000.00 has already been contributed, and the balance of $150,000.00 is subject to call as and when needed by Debs (Fol. 179).

The close association and affiliation of Debs to the Forward Association continues to the present day (Fol. 180). Their objects and purposes are precisely identical and mutually complementary (Fol. 180). Debs is the medium by which the members of the Forward Association and other adherents to its doctrines utilize radio as an avenue of communication to advance their work in the public weal (Fol. 180).

Two decisions involving Station WEVD have been rendered by the Federal Communications Commission, which licenses the operation of the station by Debs. As late as 1940 (Fol. 185), the finding is made that Station WEVD has always been maintained as a public forum for the discussion of questions of public importance in accordance with the purposes for which Debs was organized (Fols. 186, 245-6). In fact, the decision of the District Court, which forms the basis of the judgment now under review, makes the following express findings (Fol. 362):

> "Station WEVD has been maintained largely as an open public forum for the discussion of political, social

> and economic questions, as well as for the encouragement of education. There have been well organized educational programs, daily religious services, sermons, and lectures by religious leaders, discussions of local governmental problems, and other similar activities. In the discussion of controversial questions, the facilities have been made available to persons of divergent views in order that all sides might be fairly presented."

In decisions of the Federal Communications Commission it was expressly found that petitioner Debs was providing "a unique educational service" * * * "in accordance with the purposes for which (it) was organized." (Fols. 245-6). See also Folios 185, 190, 249.

The regular daily musical program known as "The Symphonic Hour" in which was broadcast a six-minute use of only a portion of respondent's musical composition was part of the "University of the Air" (Fols. 169-70, 267). This program has for its sole purpose the bringing to its audience of serious music of high quality as an educational and cultural force, with appropriate explanatory comments and without the interruptions of commercial announcements, typical of commercial broadcast stations operating in the same area (Fols. 266-7).

The record leaves no doubt and respondent does not deny that Station WEVD functions as an instrumentality for the dissemination of educational, cultural and civic programs. A general outline of the program policy of Station WEVD, as formulated by its management, is translated into specific broadcasts with the assistance of the presidents of the local colleges and universities, government officials and political economists, lecturers and specialists in all fields of learning, eminent musicians, composers and students of music, authors of literary and dramatic works, critics of music, art, literature and the drama, the clergy, representatives of labor and capital, and other prominent and quali-

fied persons (Fols. 193-4, 264-5). Programs dealing with American history, the naturalization of aliens, the education of immigrants, the support of labor schools, consumer information, musical programs and other cultural activities squarely define the operations of Station WEVD as part of a recognized movement for public welfare (Fol. 200).

This entire public service is offered without sponsorship or commercial announcement of any kind (Fols. 169-70, 267) and with no thought of deriving any profit whatsoever (Fols. 198-9, 204, 334-5, 346, 348, 351, 353-4).

In the operation of Station WEVD a limited use of its time and facilities has been devoted to some commercial programs (Fol. 195) from which certain revenue has been derived to meet normal and reasonable operating expenses of the Station and not for any gain or profit (Fols. 196-7). Debs does not make available to advertisers the choice evening periods of its allotted broadcast time but retains such periods for its educational programs as part of its unselfish public service (Fols. 198, 342, 354). In its decisions above referred to, the Federal Communications Commission has twice made specific findings that "the income from the station has been used for extension and improvement, and not for the purpose of profit" (Fols. 186, 247). Indeed, even with such limited revenue, the Station continued to operate with a deficit (Fol. 340). The District Court expressly recognized that:

> "The revenue from these commercial programs is needed to help pay operating costs, yet it appears that there were operating deficits in each of the years 1940 and 1941 of over $40,000.00" (Fol. 363).

Respondent does not dispute that the sale of time on Station WEVD is not transacted on a competitive basis and that such activities do not compare with the sales technique and operations of commercial broadcast stations

which invariably are conducted on a totally dissimilar program policy (Fols. 196, 342, 346, 354).

The Circuit Court in its opinion (R. 136) expressly held:

> "Whatever may be the charter powers of Debs, we may assume that its ultimate objects, as it has been actually conducted, have been philanthropic and educational. In carrying out its purposes it has sought immediate commercial profit, even though the reason for doing this has been to forward its philanthropic program, and to obtain funds to achieve its objects it has given broadcasting time to advertisers."

## Point I

**The Broadcast Performance of a Musical Composition by a Radio Station Which Is Operated By An Eleemosynary or Charitable Institution Exclusively Devoted to Philanthropic, Benevolent and Educational Purposes Is Not a Performance "For Profit" and Cannot Form the Basis of an Action for Infringement Under the Copyright Act.**

Copyright as well as patent laws founded upon Article I, Section 1, Clause 8 of the United States Constitution, "are enacted pursuant to this provision, not primarily for the benefit of individual (authors and) inventors, but for the benefit of the public". *Miller* v. *Hayman*, 46 F. (2d) 188, 196. "Whilst remuneration of genius and useful ingenuity is a duty incumbent upon the public, the rights and welfare of the community must be fairly dealt with and effectually guarded * * *" *Kendall, et al.* v. *Winsor*, 21 How. 322.

Implementing this paramount policy, Congress has provided protection to authors and composers but only upon condition of publication of their works (35 Stat. 1075, (1909), 17 U. S. C. A.). In the case of non-dramatic musical compositions, it has secured the exclusive right of

composers to their public performance but only insofar as such performance is "for profit". These provisions were undoubtedly intended to secure to authors and composers an economic monopoly, and at the same time make available to the public in consideration thereof the intellectual benefits of such works by allowing the free use of copyrighted non-dramatic musical compositions by all eleemosynary and educational activities which are devoid of any profit motive and which cannot therefore interfere with the economic monoply afforded the author.

Clearly, in twice referring to public performance "for profit" in Section 1(e) of the Copyright Act, Congress intended to protect authors only against such uses of musical compositions as are made in connection with business activities carried on with a view to profit, i.e. for private personal gain or the accumulation of surplus earnings to be shared as profits or distributed as dividends to corporation stockholders. Congress certainly did not intend to include in the words, "public performance for profit" any use of musical compositions by eleemosynary institutions in carrying on their educational objectives for general public welfare. Obviously, no part of their activities is carried on with the view to personal advantage.

Indeed, the chief characteristic or distinctive feature of such corporations or institutions is that they are not operated for any profit, gain or benefit to anyone, but in the interest of the public. *Bodenheimer* v. *Confederate Memorial Ass'n*, 5 F. Supp. 526, affd. 68 F. (2d) 507 (C. C. A. 4th, 1934), cert. den. on the merits, 292 U. S. 629; *Ettlinger* v. *Trustees of Randolph-Macon College*, 31 F. (2d) 869 (C. C. A. 4th, 1929); *In re Michigan Sanitarium & Benevolent Ass'n*, 20 F. Supp. 979 (E. D. Mich., 1937). As pointed out in the case last cited (P. 982):

> "Such a corporation fudamentally is entirely different from a business or commercial corporation. In one,

> a man invests his money and efforts so that he may share in its profits; in the other, he gives his money so that the objects and purposes of the corporation may be furthered. He receives in return no monetary interest in the corporation. In the first, the primary purpose is to conduct a business for the purpose of making money. In the second, the primary purposes are philanthropic, humanitarian, charitable, and benevolent in character."

Moreover, the legal meaning of charitable purposes is not necessarily limited to free service to the poor. *People ex rel. Doctors Hospital, Inc.* v. *Sexton, et al.*, 48 N. Y. Supp. (2d) 201 (not yet officially reported); *Matter of MacDowell's Will*, 217 N. Y. 454, 463, 112 N. E. 177, 179, L. R. A. 1916 E, 1246, Ann. Cas. 1917 E, 853; *Young Men's Christian Ass'n of City of New York* v. *City of New York*, 159 Misc. 539, 287 N. Y. Supp. 287, aff'd 251 App. Div. 821, Aff'd 276 N. Y. 619, 12 N. E. (2d) 605; *Matter of New York University* v. *Taylor*, 251 App. Div. 444, 296 N. Y. Supp. 848, aff'd 276 N. Y. 620, 12 N. E. (2d) 606.

All liability of persons who perform non-dramatic musical compositions publicly for profit stems from the leading case of *Herbert* v. *Shanley*, 242 U. S. 591 (1917). In that case Mr. Justice Holmes held that so long as the purpose of the defendant restaurant was to perform the music in connection with a business which was operated for profit, it was a public performance for profit within the meaning of the Copyright Law. Mr. Justice Holmes said:

> "The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people hav-

ing limited powers of conversation, or disliking the rival noise, give a luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough."

The earliest case dealing with radio broadcast performance of copyrighted music is *M. Witmark & Sons* v. *L. Bamberger & Co.*, 291 Fed. 776 (D. N. J., 1923) where District Judge Lynch followed the previous decisions interpreting the Act of 1909 and held that Station WOR, which was operated by the defendant department store owner, was made a part of the business system of defendant's store because the cost of broadcasting was charged against the general expenses of the business. The broadcast advertising of the defendant's business included the broadcast performance of copyrighted musical material which was held to be thereby infringed.

The Court held that the profit motive was predominant in the broadcast and that the station was not an eleemosynary institution.

In *Remick* v. *American Automobile Accessories Co.*, 5 F. (2d) 411, cert. den. 269 U. S. 556, the Circuit Court of Appeals for the Sixth Circuit held that the question of public performance for profit under the Act of 1909 was settled by *Herbert* v. *Shanley, supra.* In both *Remick* v. *American Automobile Accessories Co., supra,* and *Witmark* v. *Bamberger, supra,* the stations were operated under commercial licenses from the Department of Commerce and served primarily as advertising media for their owners who were operating the broadcast stations in conjunction with their respective retail business enterprises in which merchandise was sold for profit.

In the *Remick* case, the Court found that the station was maintained as a regular business enterprise with a view

to private profit by advertising a business "in the expectation and hope of making profits through the sale of one's products". The Court there also expressly recognized the necessity that

> "the purpose of the performance be for profit, and not eleemosynary; it is against a commercial, as distinguished from a purely philanthropic, public use of another's composition, that the statute is directed." (p. 412)

The same is true of *Witmark* v. *Bamberger, supra,* where the costs of operation of the station were charged against the expenses of the department store owner as advertising disbursements. The Court there called attention to the continuous mention of the store's slogan which resulted in the "development and enlargement of the business of the department store" and pointed out at page 779:

> "If the defendant desired to broadcast for purely eleemosynary reasons, as is urged, is it not likely that it would have adopted some anonymous name or initial? * * * But it does not appear, and the Court cannot believe, that those charitable acts are all labeled or stamped, 'L. Bamberger & Co., One of America's Great Stores, Newark, N. J.' "

There can be no doubt that liability for copyright infringement of a non-dramatic musical work by public performance must be predicated upon the finding of fact that the work was performed "for profit" in connection with a private business operated for profit.

The profit motive was found in each instance to consist in the performance of music unquestionably as part of the entire business activity which was designed to derive private gain in the price of food and drink purchased at a restaurant which, without music, might have been obtained more cheaply, as in *Herbert* v. *Shanley,* 242 U. S. 591, and

*Buck* v. *Russo*, 25 F. Supp. 317; or in the price of accommodations and facilities of a hotel which likewise might have been obtained for less elsewhere were it not for the music which was made available to guests in the rooms by the use of loudspeakers, as in *Buck* v. *Jewell-La Salle Realty Co.*, 51 F. (2d) 726, aff'd. 283 U. S. 191; *Society of European S. A. C.* v. *N. Y. Hotel Statler Co.*, 19 F. Supp. 1; or, in the price of merchandise advertised by the store owner in radio broadcasts using music, as in *Witmark* v. *Bamberger*, 291 Fed. 776; *Remick* v. *American Automobile Accessories Co.*, 5 F. (2d) 411, cert. den. 269 U. S. 556; and *Remick* v. *General Electric Co.*, 16 F. (2d) 829; or in the price for admission to a dance or amusement hall as in *Dreamland Ball Room* v. *Shapiro, Bernstein & Co.*, 36 F. (2d) 354; and *Irving Berlin, Inc.* v. *Daigle*, 31 F. (2d) 832; or in the price for admission to a motion picture theatre, *Harms* v. *Cohen*, 279 Fed. 276; *Witmark* v. *Pastime Amusement Co.*, 298 Fed. 470, aff'd 2 F. (2d) 1020; *Witmark* v. *Calloway*, 22 F. (2d) 412.

The general intent and policy of Congress in not including eleemosynary institutions within the meaning of the phrase "for profit" in Section 1(e) of the Copyright Act is manifest in other enactments. It requires no citation of authority for the proposition that in construing a particular statute, resort to other statutes always has been deemed worthy of consideration and helpful in an effort to arrive at the intention of a legislative body in the use of the particular language employed in the statute under consideration.

Thus, in enacting the Income Tax Act of 1925, Congress has specifically provided that its provisions shall not apply to corporations "organized and operated exclusively for * * * charitable * * * or educational purposes * * * no part of the net earnings of which inures to the benefit of any private shareholder or individual." (26 U. S. C. A.

103.) Substantially identical provisions are made with respect to Capital Stock Taxes (26 U. S. C. A. 1358(c)) with reference to charitable contributions (26 U. S. C. A. 26(c)); and in the Securities Act of 1933 (15 U. S. C. A. 77(c) 4). Even a cursory examination of indices of statutes will reveal similar exemptions by all State legislatures. Such exemption, this Court has pointed out, "is made in recognition of the benefit which the public derives from corporate activities of the class named and is intended to aid them when not conducted for private gain." *Trinidad* v. *Sagrada Orden de Predicadores,* 263 U. S. 578, 581.

Such Congressional and other legislative recognition and intention, as thus expounded by this Court, evidence the general policy of the nation and the several States invariably to treat the activities of such corporations as eleemosynary and philanthropic, involving no motive of private profit, as distinguished from those of private commercial associations, or corporations which are carried on as a regular business for profit. The same general policy is revealed by the decisions of the courts (1) in interpreting statutes referring to moneyed, commercial or business corporations as not applying to eleemosynary institutions, *In re Michigan Sanitarium and Benevolent Ass'n., supra;* and (2) in establishing special principles and exceptions with respect to liability of eleemosynary corporations entirely distinct from those ordinarily applicable to corporations generally. *Ettlinger* v. *Trustees of Randolph-Macon College, supra; Bodenheimer* v. *Confederate Memorial Ass'n., supra.*

In the light of this general policy it is manifest that the provisions relative to public performance "for profit" in the Copyright Act were intended to exclude every performance of a non-dramatic musical composition in connection with activities which do not involve the profit motive.

## Point II

### The Use of a Limited Portion of WEVD's Allotted Broadcast Time by Advertisers Should Not Make Petitioner Liable for Copyright Infringement on the Facts Herein.

The District Court found that some revenue has been derived by the petitioner Debs from a limited use of its facilities by advertisers (Fol. 362) although it acknowledged the specific provisions of the by-laws directing the use of such funds "for the improvement of educational and cultural activities of the station" (Fol. 360). The Federal Communications Commission's findings are to the effect that "the income from the station has been used for extension and improvement and not for the purpose of profit" (Fols. 186, 247). The record also leaves no doubt, as the District Court's opinion expressly recognized (Fol. 363) that "the revenue from these commercial programs is needed to help pay operating costs, and yet it appears that there were operating deficits for each of the years 1940 and 1941 of over $40,000" (Fols. 196-7, 340, 363).

These deficits and the fact that the operation of Station WEVD continues to be financed with advances from the Forward Association amounting to $425,000.00 exclusive of public donations, remove any doubt that the income derived by the station is devoted solely to the furtherance of its eleemosynary and educational activities. Under such circumstances, the fact that a portion of the station's time is devoted to commercial broadcasts does not affect the charitable character of petitioner's Station WEVD or its exclusively philanthropic and humanitarian activities. Nevertheless, the Circuit Court of Appeals expressly held:

> "It is unimportant whether a profit went to Debs or to its employes or to the advertisers." (R. 139)

The decision of this Court in *Trinidad* v. *Sagrada Orden de Predicadores,* 263 U. S. 578, is squarely in point and conclusive of this phase of the case. There, the plaintiff had an income in rents from real estate operated by it, dividends from stocks owned by it, interest on money loaned and from the sale of stocks, wine, chocolate and other articles as well as from alms. It was contended that all these transactions prevented the plaintiff corporation from being one "organized and operated exclusively for * * * charitable * * * purposes" within the meaning of the Statute exempting such corporations from tax. This contention was described by this Court as follows at page 581:

> "Stated in another way, the contention is that the plaintiff is operated also for business and commercial purposes in that it uses its properties to produce income, and trades in wine, chocolates, and other articles. In effect, the contention puts aside as immaterial the fact that the income from the properties is devoted exclusively to religious, charitable and educational purposes, and also the fact that the limited trading, if it can be called such, is purely incidental to the pursuit of those purposes, and is in no sense a distinct or external venture."

This Court struck down this contention and said (p. 581):

> "Evidently the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain. Such activities cannot be carried on without money; and it is common knowledge that they are largely carried on with income received from properties dedicated to their pursuit. This is particularly true of many charitable, scientific and educational corporations and is measurably true of some religious corporations. Making such properties productive to the end that the income may be thus used does not alter or enlarge the purposes for

> which the corporation is created and conducted * * * In using the properties to produce the income, it therefore is adhering to and advancing those purposes, and not stepping aside from them or engaging in a business pursuit."

Likewise, in *Roche's Beach, Inc.* v. *Commissioner of Internal Revenue*, 96 F. (2d) 776 (1938), the Circuit Court held a corporation to be one "organized and operated exclusively for charitable purposes" (p. 778) within the meaning of a similar statute (26 U. S. C. A. 103 (6)), despite the fact that it was organized as a business corporation under the New York Stock Corporation Law. Its chief purpose and activities were to operate the bathing beach business of its founder and collect the income therefrom which was turned over to another corporation devoted exclusively to charitable purposes. The Circuit Court there cited with approval *In re Unity School of Christianity*, 4 U. S. B. T. A. 61, where the same result was reached in a similar situation upon the authority of this Court's decision in the *Trinidad* case, *supra*.

In *Bodenheimer* v. *Confederate Memorial Ass'n.*, 5 F. Supp. 526, aff'd. 68 F. (2d) 507 (C. C. A. 4th, 1934), cert. den. on the merits, 292 U. S. 629, a non-profit memorial corporation organized to collect Civil War data was likewise held to be an eleemosynary institution despite the fact that it charged a fee for entry into its museum. The Court there pointed out, at page 528:

> "From the testimony it clearly appears that the funds derived from admission fees are scarcely sufficient to pay the necessary expenses of keeping 'Battle Abbey' open for the benefit of historians, students, and the general public; that there has never been any profit from the operations of the association, and, even if there were profits therefrom, the trustees, under the terms of the charter, would be required to expend

such profit in the acquistion of additional historical data."

Indeed, it is common knowledge, that in almost every one of these institutions "in the carrying out of its objects and purposes it performs business transactions, which are, however, not for anyone's benefit or pecuniary gain." *In re Michigan Sanitarium & Benevolent Ass'n.*, 20 F. Supp. 979, 982 (E. D. Mich., 1937). For example, hospitals charge fees in most cases and even rent certain facilities or surplus rooms (*In re Michigan Sanitarium & Benevolent Ass'n., supra; Schloendorff* v. *The Society of the New York Hospital,* 211 N. Y. 125); while colleges and universities derive an income from tuition and other fees, as illustrated in *Ettlinger* v. *Trustees of Randolph-Macon College,* 31 F. (2d) 869 (C. C. A. 4th, 1929) and cases there cited. The income thus derived, however, does not alter the character of such corporations or affect their entirely eleemosynary activities and objectives. For, as pointed out by Professor Lile in his "NOTES ON MUNICIPAL CORPORATIONS" (1922 Ed.) pages 101-2:

> "* * * the fees so received are converted into the corporate treasury and become at once as completely dedicated to the purposes of the trust as the original corpus. One distinctive feature of such corporations is that no dividends are paid out as private profit to individuals. A college or hospital, therefore, requiring payment of fees or other compensation from students or patients may be as completely and technically a charitable institution as a like institution whose services are free to all who apply."

It is only when the net income in the form of surplus earnings is distributed as private profit to stockholders or individuals or otherwise used for personal rather than public benefits that such a corporation and its activities lose their

eleemosynary character. *Trinidad* v. *Sagrada Orden de Predicadores,* 263 U. S. 578; *Bodenheimer* v. *Confederate Memorial Ass'n., supra; Roche's Beach, Inc.* v. *Commissioner of Internal Revenue, supra; In re Unity School of Christianity, supra.*

The decision below not only ignores the profit motive as the *sine qua non* of such an infringement action but also erroneously waves aside as immaterial the fact that the limited use of the station for commercial programs is purely incidental to the pursuit of the basic educational and cultural purposes "and is in no sense a distinct or external venture". *Trinidad* v. *Sagrada Orden de Predicadores,* 263 U. S. 578, 581.

The test of liability thus adopted by the Circuit Court herein, if sustained, would transform all hospitals recognized or held to be eleemosynary institutions like those involved *In re Michigan Sanitarium and Benevolent Ass'n.,* 20 F. Supp. 979, 982 (E. D. Mich., 1937); *Schloendorff* v. *Society of New York Hospital,* 211 N. Y. 125; *People ex rel. Doctors Hospital* v. *Sexton, et al.,* 48 N. Y. Supp. (2d) 201 (1944), and place them in the same category as businesses for profit, simply because their manner of operation is the same. By the same token, all differences would be abolished which distinguished charitable organizations from their commercial counterparts. The mere similarity of some of their functions cannot destroy the fundamental difference in organic structure and purpose. For example, most universities and colleges compete with private interests in supplying living accommodations and meals, specialized instruction as well as general education, books, equipment and clothing in veritable department stores, local newspapers and magazines and a myriad of other services. Yet no one would ever challenge the eleemosynary character of such educational institutions simply because their operation is

in some respects similar to that of commercial concerns engaged in business for private profit.

The fact that Station WEVD competes with other stations for a listening audience has no bearing on the issue. Presentation of a variety of programs is inherent in the broadcasting medium. Every non-profit educational institution competes in every activity with private enterprises offering similar services. A radio station can be and is organized and operated with the same motives as any other educational institution.

A school, church or other charitable organization which rents a hotel ballroom, purchases and sells food and drink, hires an orchestra, prints a souvenir program in which it sells advertising space, and sells tickets of admission to the public, competes in all of these activities with private enterprises. The public performance of music at such charitable functions does not infringe copyrights and no attempt has even been made to urge such an untenable claim. Yet the mere fact that Debs uses the facilities of its radio station to carry on its non-profit educational objects has been distorted here to serve as the basis for respondent's specious claim of copyright infringement. The novelty of respondent's claim does not make it valid. All of respondent's contentions serve only to create false questions of fact which, in themselves, require a reversal of the decision below.

The record, including the reports and decisions of the Federal Communications Commission and even the decisions of the Courts below now under review, reveals that the activties of Station WEVD are barren of any profit implications and are in nowise motivated by any expectations of eventual private profit to petitioners. By the economics of our society, profit, direct or indirect, presupposes a gain on invested capital and a return commensurate with the risk of capital—elements wholly absent in this case.

It follows that all of the activities of Debs and its Station WEVD always have been and are eleemosynary and without any profit motive, and, therefore, the use of a portion of respondent's non-dramatic musical composition by Debs was not a performance "for profit" and cannot sustain an action for infringement under the Copyright Act.

## Point III

### The Broadcast of Respondent's Composition by an Eleemosynary Radio Station Constituted a Fair Use Thereof Because of the Nature of the Performance. The Extent of the Use Made of the Copyrighted Work Is Immaterial

The question of what constitutes a "fair use" of a copyrighted work has never been passed upon or settled by this Court. Despite the fact that there are at least two distinct types of fair uses which exempt the user of a copyrighted work of liability for infringement, the District and Circuit Courts throughout the country have confined the doctrine of fair use to quantitative yardsticks in disregard of the underlying rationale of such exemption. The extent of the use made by petitioners of respondent's composition has nothing whatsoever to do with their exemption from infringement liability under the doctrine of fair use herein urged. It is the nature and purpose of the use which governs such exemption.

The Courts below failed to distinguish between the foregoing doctrine of "fair use" of a copyrighted work for the advancement of education, science and art and the separate and distinct doctrine of "fair use" which has developed to sanction the limited use of a copyrighted work for purposes of criticism and comment (*Ricordi & Co.* v. *Mason,* 201 Fed. 182, aff'd 210 Fed. 277 (C. C. A. 2nd, 1913), or mimicry (*Savage* v. *Hoffmann,* 159 Fed. 584; *Bloom & Hamlin* v.

*Nixon*, 125 Fed. 977; see *Chappell & Co.* v. *Fields*, 210 Fed. 864). This distinction is pointed out in *Towle* v. *Ross*, 32 F. Supp. 125, 127, n. 4. These authorities hold that fair usage in the latter sense is merely another way of saying that no substantial part of a copyrighted work has been appropriated. Petitioners, however, contend that the true legal significance of the doctrine of fair use is that no infringement liability can be predicated upon the appropriation, performance or other use of a copyrighted work by a charitable or educational organization in connection with the advancement of knowledge. Such judicial immunity arises by implication of consent or equitable estoppel of a copyright owner by reason of the fundamental theory of copyright protection to the author for the benefit of the public. *Miller* v. *Hayman*, 46 F. (2d) 188, 196.

Respondent had knowledge before the performance by petitioners of respondent's work that the composition herein involved would be broadcast as part of the "Symphonic Hour" program (Fol. 137). Respondent may be charged with direct knowledge of the long established cultural, educational and non-commercial character of the "Symphonic Hour" program. Even if respondent had no such direct knowledge, it may be held at law to have given its implied consent to the use of the said work for the advancement of the art of music and for educational purposes. Such use by the petitioner may be deemed to be no more than a fair use of respondent's copyrighted work by an eleemosynary corporation.

As was said by Judge Maris in *Henry Holt & Co., Inc., et al.* v. *Liggett and Myers Tobacco Co.*, 23 F. Supp. 302 (E. D. Pa., 1938):

> "It is true that the law permits those working in a field of science or art to make use of ideas, opinions, or theories, and in certain cases even the exact words contained in a copyrighted book in that field. *Sampson &*

*Murdock Co.* v. *Seaver-Radford Co.*, 1 Cir., 140 F. 539. This is permitted in order, in the language of Lord Mansfield in *Sayre* v. *Moore*, 1 East 361, 102 Eng. Reprint 139, 'that the world may not be deprived of improvements, nor the progress of the arts be retarded.' In such cases the law implies the consent of the copyright owner to a fair use of his publication for the advancement of the science or art.''

**Conclusion**

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

A. Walter Socolow,
*Counsel for Petitioners.*

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# Supreme Court of the United States

**OCTOBER TERM, 1944**

**No. 468**

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DEBS MEMORIAL RADIO FUND INC. and
HENRY GREENFIELD,

*Petitioners,*

vs.

ASSOCIATED MUSIC PUBLISHERS, INC.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARTHUR E. GARMAIZE,
Attorney for Respondent.

Of Counsel:
JULIUS HENRY COHEN,
ARTHUR E. GARMAIZE.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### Proceedings and Opinions

Respondent, Associated Music Publishers, Inc., publishes and licenses the performance of copyrighted serious music. All the radio networks and in excess of 300 stations hold licenses for the performance of its repertoire.

Respondent as plaintiff below obtained summary judgment for infringement by performance by broadcast (fol. 15) of its copyrighted orchestral work entitled "Petite Suite Espagnole", consisting of four parts, "Ausencia" (Serenade), "Habanera", "Noche de Arabia" (Intermezzo) and "Baile Andaluz".

The opinion of the District Court for the Southern District of New York is reported in 46 F. Supp. 829. The opinion of the Circuit Court of Appeals for the Second Circuit affirming is reported in 141 F. 2d 852.

## Summary of the Facts *

The only business of the corporate petitioner is the ownership and operation of Radio Station WEVD (fol. 73, 10Q.A.). The personal petitioner is the paid manager (fol. 74, 11Q.A.; fol. 94, 63Q.A.), exercising considerable, perhaps unrestricted, freedom in choosing the music to be broadcast (fols. 84, 85). His executive committee and board of directors "presumed at all times that anything that was copyrighted has to be purchased" (fol. 83, 29Q.A.).

The corporate petitioner was incorporated as a business corporation under Article 2 of the Stock Corporation Law (fols. 108-120). Its capital stock consists of 100 common shares without par value (fol. 116) and cumulative voting is provided for (fol. 117).

The certificate of incorporation as descriptive of purposes does not contain the words "eleemosynary", "charitable", "philanthropic", "benevolent", "educational", "religious", "cultural", "public welfare" or "public service". Its stated purpose is "to engage in the business of broadcasting" and does contain as descriptive of purposes the phrases "business of broadcasting", "business corporation", "business of this company or business of a similar nature", "business corporation law", "business", "objects of its business" and "to turn to account trade secrets, trademarks, patents, licenses, processes or formulas".

The corporate petitioner exercised its inherent right and power to declare dividends twelve days after incorporation for according to the findings of fact preceding the opinion in *Debs Memorial Radio Fund, Inc., Petitioner, v. Commissioner of Internal Revenue, Respondent,* 3 T. C. (No. 6), p. 949, 950, the following bylaw was adopted:

> "On March 27, 1928, bylaws were adopted, including:

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* Additional facts relating to the broadcast are stated in the second and third paragraphs on pages 10 and 11 under Point III, "Unfair Use".

ARTICLE VI. DIVIDENDS. Section 1. The Board of Directors shall by vote declare dividends from the surplus profits of the Company whenever in their opinion the condition of the Company's affairs will render it expedient for such dividends to be declared by them."

The record at folio 171 states that the corporation is wholly owned and operated by nominees of The Forward Association. However, the deposition of corporate petitioner's treasurer-director, in response to questions by its own attorney, stated that "those who held the stock assigned it to the new owners (nominees of The Forward Association) in consideration of the new owners assuring payment of all the debts of the corporation at that time" (fol. 101, 82Q.A., 83Q.A.).

For three years after incorporation the corporate petitioner was operated upon solicited donations (fols. 88, 172). Upon acquiring the stock The Forward Association made donations and advances to the corporation (fols. 174, 179). These donations and advances were not and are not by any binding instrument impressed with a trust dedicating their use primarily and exclusively to charitable, educational or like purposes. The absence of a trust over these funds leaves them open for use otherwise than for charitable or educational purposes.

The Forward Association in 1931 agreed to advance the corporate petitioner up to $250,000 (fols. 174, 179) with the expectation of securing repayment of all sums advanced (fols. 175, 339). The directors by resolution were to be trustees of the acquired stock until the advances were repaid (fols. 100, 174). Also in the year 1931 a resolution, "whatever legal value it may have", was adopted that none of the profits should be used for dividends (fol. 87, 46Q.A.). It is not inconsistent with the record to presume that the resolutions not to use profits for dividends and making the directors trustees for the advances were a sort of security for the loans (fol. 339) made by The Forward Association. Also in the year 1931 The Forward Association adopted a resolution to take necessary steps

at some unstated future time to reorganize the corporate petitioner so that "it shall become a membership corporation to exist and operate as a non-profit sharing corporation" (fol. 176).

This record is silent on whether the corporate petitioner pays interest upon the loans. This record is also silent on whether the corporate petitioner has claimed or secured exemption from the payment of taxes upon income and real estate by virtue of the exemptions enacted by federal and state laws in favor of eleemosynary, charitable, educational and like institutions.

The infringing performance took place on October 18, 1940. This record contains an affidavit sworn to by an accountant on April 7, 1942 (fols. 337-342), stating that the books and records of the corporate petitioner

> "as of December 31, 1941 disclose that the said defendant has an operating deficit in the sum of $40,597.67" (fol. 340).

However, the findings of fact in *Debs Memorial Radio Fund Inc., Petitioner* v. *Commissioner of Internal Revenue, Respondent,* 3 T. C. (No. 6), 949, wherein this same petitioner unsuccessfully sought exemption from taxation, show that petitioner had net income of $30,700.57 in 1940 and $6,053.68 in 1941. The findings appear at page 955 thus:

> "From 1932 to 1942, both inclusive, petitioner's income, other than a few small items of interest and miscellaneous income and $2,731.87 received in 1942 as gain on the sale of a mortgage, was from commercial broadcasting over WEVD. Its gross income from broadcasting, commissions paid, and net income or loss as shown by its Federal income tax returns were as follows:

| *Year ended—* | *Gross income from broadcasting* | *Commissions paid* | *Net income or (loss)* |
|---|---|---|---|
| Oct. 31, 1932 | $ 18,421.16 | $ 957.85 | ($27,043.72) |
| Oct. 31, 1933 | 42,273.40 | 6,530.23 | (33,502.23) |
| Dec. 31, 1933 (2 mo.) | 13,103.54 | 2,978.24 | (4,059.63) |
| 1934 | 83,939.73 | 18,483.01 | (21,703.00) |
| 1935 | 173,449.10 | ..... | (980.96) |
| 1936 | 189,948.03 | ..... | 3,841.27 |
| 1937 | 225,040.95 | 34,847.41 | 15,042.33 |
| 1938 | 183,034.69 | 35,898.90 | (2,627.33) |
| 1939 | 284,294.41 | 52,855.47 | 9,221.69 |
| 1940 | 323,834.16 | 52,955.36 | 30,700.57 |
| 1941 | 290,385.69 | 55,631.10 | 6,053.68 |
| 1942 | 294,466.11 | 50,411.44 | 7,449.18" |

This record shows: Advertisers are accepted (fol. 98, 74Q.A.) and they pay for the time and broadcasts of the station (fol. 90, 55Q.A.; fols. 195, 362, 363). There is no decided or absolute limit placed upon the time sold (fol. 92, 59Q.A.). Sustaining programs are broadcast to increase the listening public (fol. 96, 69Q.A.; fol. 99, 77Q.A.). The number of commercials or advertising broadcasts has increased (fol. 97, 73Q.A.). The rates charged for advertising have likewise increased (fol. 98, 75Q.A.). At one time the management devoted 33% of the time of the station to commercial or advertising programs and 67% of the time to sustaining programs (fol. 248). The record is silent upon the present relationship between sustaining and commercial programs. At one period the most valuable time of the station, Saturdays from 6 to 8 P. M. (fol. 187) and Sundays from 6 to 8 P. M. (fol. 249), was devoted to commercial programs. The record is silent on the present use of the most valuable time. "The policy is to reserve as much time for that (sustaining programs) as is possible after the operating expenses have been covered and a reasonable reserve for contingencies" (fol. 93, 60Q.A.).

## POINT I

**The words "for profit" in the expression "public performance for profit" embrace all means employed for the immediate or remote purpose of gain and charitable or educational institutions or purposes are not exempt from copyright infringement by performance unless they qualify within the last proviso of Section 28 of the Copyright Act.**

The Copyright Act, 17 U. S. C. A. 1-e, provides:

> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right * * * (e). To perform the copyrighted work publicly for profit if it be a musical composition* and for the purpose of public performance for profit;"

Construing the words "for profit", this Court said in *Herbert* v. *Shanley Co.*, 242 U. S. 591, 595, 61 L. Ed. 511, 514:

> "If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough."

Except for the temporary non-distribution of its profits by virtue of a revocable resolution, the corporate petitioner functions like the National Broadcasting Company, the Blue Network, Inc., the Columbia Broadcasting System,

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* The Copyright Office prints the Copyright Act in its Bulletin No. 14. The semicolon is placed at the word "composition" and the following note at page 1 is printed: "As printed in U. S. Code, title 17, section 1, subsection (e), lines one to three read: 'To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit; and for the purposes set forth in subsection (a) hereof * * *.' As printed in this bulletin the text agrees with the construction placed thereon by Mayer, J., in *Hubbell* v. *Royal Pastime Amusement Co.*, D. C., S. D. of N. Y., 242 Fed. Rep. 1002-1003."

Inc., the Mutual Broadcasting System and other radio stations for civic, political, educational and cultural purposes generally by devoting varying amounts of station time to sustaining programs for the sole purpose of attracting a larger listening public.

Sustaining programs are not eleemosynary. They are part of a total for which the advertisers pay.

The last proviso of Section 28 reads as follows:

> "Provided, however, That nothing in this Act shall be so construed as to prevent the performance of religious or secular works, such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, school choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit."

*Church Co.* v. *Hilliard Hotel Co.*, 221 F. 229 (overruled by *Herbert* v. *Shanley*, 242 U. S. 591), the only case found referring to the last proviso of Section 28, said at page 230:

> "We think it was to permit certain high-class religious and educational compositions to be performed at public concerts where an admission fee is charged, provided the proceeds are applied to a charitable or educational purpose."

The musical work involved in this petition is not of the class named in the exempting clause nor claimed to have been rented, borrowed or obtained from some public library, public school, church choir, school choir or vocal society, since the performance was rendered by means of a phonograph record alleged to have been purchased in the open market (fols. 168-169).

The performance involved was not given by a public school, church choir or vocal society.

Bills amending and consolidating the Acts respecting copyright heretofore introduced contained provisions ex-

empting charitable, religious and educational organizations from copyright infringement by performance. They were not enacted into law and one such was S. 3043 introduced January 8, 1940:

> "SEC. 12. No remedies shall be available under this Act in the following cases:
>
> (a) The performance of a copyrighted musical composition, with or without words, by a recognized bona fide charitable, religious, or educational organization: *Provided,* That the entire proceeds thereof, after deducting the actual reasonable cost of presenting the same, are devoted exclusively to charitable, religious, or education purposes: *And provided further,* That, no part of the proceeds of such performance shall be for the private gain of any promoter or similar participant in the enterprise."

Operation to some extent as an "open public forum for the discussion of civic, political and cultural matters" (similarly as the four radio networks and other stations) "from the educational as well as the musical point of view" (fol. 93, 60Q.A.) is too incidental and remote from the purposes of charitable, educational or like institutions to be regarded as within that class of institutions (*Medical Diagnostic Ass'n* v. *Com'r,* 42 B. T. A. 610).

A temporary and revocable resolution not to distribute profits and the status of its present parent, The Forward Association, as a membership corporation, do not aid the corporate petitioner in its ambition to become in this litigation a charitable, educational or like institution (*Produce Exchange Stock Clearing Ass'n, Inc.* v. *Com'r,* 2 Cir., 71 F. (2) 142, 143).

## POINT II

### Ground for invoking jurisdiction is not shown.

The Courts declined to hold that the corporate petitioner was a charitable or educational institution although at-

tributing to it some philanthropic, educational and cultural purposes and activities. Petitioners do not seek to review the failure to so hold. On the contrary the District Court said (46 F. Supp. 829, 830):

> "There is no contention, however, that the corporation is a public or charitable institution."

The Circuit Court in its opinion, 141 F. (2) 852, 855, said:

> "Both in the advertising and sustaining programs Debs was engaged in an enterprise which resulted in profit to the advertisers and to an increment to its own treasury whereby it might repay its indebtedness to Forward Association *and avoid an annual deficit* • • •." (Emphasis supplied.)
>
> "It is unimportant whether a profit went to Debs or to its employes or to the advertisers."

*Debs Memorial Radio Fund Inc., Petitioner* v. *Commissioner of Internal Revenue, Respondent,* 3 T. C. (No. 6), pp. 949, 960 (June 5, 1944), denying this corporate petitioner exemption from taxation, held that this petitioner was

> "organized as a business corporation with wide business powers and no charter expression of the welfare purpose of its founders, and actually engaging to a great extent in the operation of a profit business in a competitive commercial field."

The Tax Court also held at pages 958 and 959:

> "Also, it was clear in extant decisions that, although an exemption was not lost by a corporation engaging in business for profit, this was only when such business operations for profit were merely incidental to the promotion of a grand charitable purpose and activity. *Trinidad* v. *Sagrada Orden de Predicadores,* 263 U. S. 578; *Unity School of Christianity,* 4 B. T. A. 61. See also *Hanover Improvement Society, Inc.* v. *Gagne,* 92 Fed. (2d) 888.

• • • • • •

> Clearly the doctrine of the *Trinidad* case, the *Roche's Beach* case (96 Fed. (2d) 776), the *Hanover* case, and the *Unity School* case, can not be applied to this corporation. Its activities are to too great an extent those of a commercial broadcasting station for profit (*Associated Music Publishers* v. *Debs Mem. Radio Fund, supra**) and the profits of that part of its business are not required to be devoted to the support of its cultural sustaining program or to the promotion of social welfare."

Three courts have decided that the corporate petitioner is organized and operates for profit. These decisions rest on the facts. The novel question and conflict with *Herbert* v. *Shanley,* 242 U. S. 591, stated as ground for review, must then be found in the facts of the case. Special and important reasons for the review of facts are not stated and under Rule 38, paragraph 5, and *United States* v. *Johnston,* 268 U. S. 220, 227, this Court does not review facts.

## POINT III

### Petitioners' use was competing and unfair use.

The petitioners disregard the principle inherent in the doctrine of fair use that such use must fall far short of competitive use.

There was no denial that the entire work takes twenty minutes to perform (fols. 143, 150, 156), that the entire work takes up 117 pages of musical notes (fol. 156), that the portion broadcast, "Noche de Arabia", takes up thirty pages of musical notes (fol. 156), that the performance was of a quarter of the work in respect of musical notes (fol. 156) and in excess of a third of the work in respect of time (fol. 170).

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* 46 F. Supp. 829.

The petitioners conceded they "had received no permission or license from the plaintiff to perform the composition by radio broadcast" (fols. 170, 358).

Fair use permits those working in a field of science or art to make use of ideas, opinions or theories, and in certain cases even the exact words contained in a copyrighted work in that field, but does not permit the reproduction of copyrighted material to advance a purely commercial purpose—such as the sale of merchandise (*Henry Holt & Co., Inc.* v. *Liggett & Myers Tobacco Co.*, 23 F. Supp. 302, 304). The petitioners here have performed the copyrighted musical work to advance the sale of the *time* of the station which in the business of radio broadcasting is *merchandise* equally as cigarettes, and as well to advance the revenue-producing elements of the station.

In *New York Tribune, Inc.* v. *Otis & Co.*, 39 F. Supp. 67, the Court said at page 68:

> "The extent and relative value of the copyrighted material, the purpose for the claimed 'fair use', and the effect upon distribution and objects of the original work are some elements entering into the determination of the issue. *Broadway Music Corp.* v. *F-R Pub. Corp.*, 31 F. S. 817."

In *Towle* v. *Ross*, 32 F. Supp. 125, it was said at page 127:

> "There is no fair or non-competing use of copyright material unless by consent."

It is obvious that the printing and publishing of one-quarter or of one-third of a work would be competitive and unfair. In the matter of reproduction, radio stations are not different from printing presses. The injury to the owner is greater because radio performance revenue nowadays is larger than the revenue from sheet music sales of serious music.

## CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

ARTHUR E. GARMAIZE,
Attorney for Respondent.

Of Counsel:
JULIUS HENRY COHEN,
ARTHUR E. GARMAIZE.

(38)

OCT 16 1944

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 468

DEBS MEMORIAL RADIO FUND INC., AND HENRY GREENFIELD,

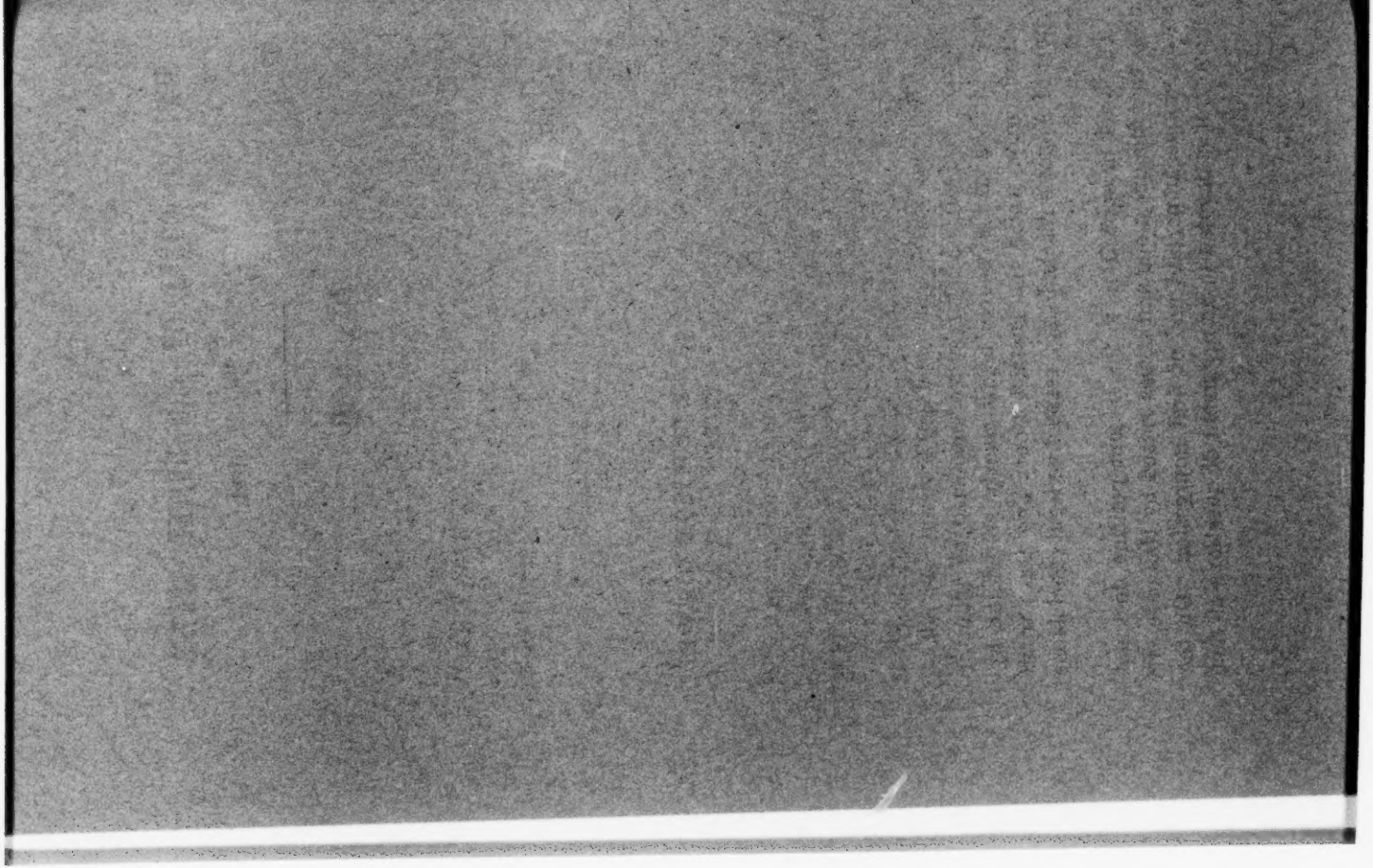
*Petitioners,*

*vs.*

ASSOCIATED MUSIC PUBLISHERS, INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI



SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1944**

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# No. 468

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DEBS MEMORIAL RADIO FUND INC., AND HENRY GREENFIELD,

*Petitioners,*

against

ASSOCIATED MUSIC PUBLISHERS, INC.

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## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The judgment affirmed below was entered on an order granting summary judgment and was based upon the facts set forth in the affidavits. Petitioners' answering affidavits contain statements of fact as to the nature and conduct of the operations of petitioner Debs Memorial Radio Fund Inc. The record shows that such facts have not been denied and that no reply affidavits were submitted by plaintiff. The opinions of the courts below clearly stated the hypothesis upon which the District Court and the Circuit Court of Appeals reached their respective legal conclusions and decisions.

The brief in opposition to the instant petition does not deny that the questions and issues raised by this case are novel, unique, important and of first impression. On the contrary, it is devoted to an argument of questions of fact

which form no part of the hypothesis upon which the courts below rendered their decisions. This Court is not concerned with the review of evidence in the record or of any specific facts.

**Factual Hypothesis Assumed By the Courts Below**

The argument in the brief in opposition to the instant petition begs the very questions of law raised herein by petitioners. Both courts below rendered their opinions and decisions on the assumption that the test of petitioners' liability depends upon their actual operations and ultimate objects irrespective of the particular form of incorporation utilized. The Circuit Court of Appeals expressly so stated at 141 F. 2d 852, 854 and the District Judge expressly held that his decision did not depend on whether the corporate petitioner "in its general structure is a profit sharing corporation or not" (46 F. Supp. 829, 830).

In the opinion of the Circuit Court of Appeals below, the following was stated:

> "Whatever may be the charter powers of Debs, we may assume that its ultimate objects, as it has been actually conducted, have been philanthropic and educational." (141 F. 2d 852, 854).

In the opinion of the District Court the issue was set forth as follows:

> "The question then is whether the unlicensed broadcast of a copyrighted musical composition on a sustaining program of a non-profit station, which devotes one-third of its time to commercial broadcasts, is a performance for profit within the meaning of the Copyright Act, 17 U. S. C. A. Sec. 1(e)." (46 F. Supp. 829, 830).

Any other discussion of the evidence in the record can serve only to raise questions of fact, which are not only

improper and irrelevant, but the mere existence of such disputed facts, if they have any legal significance, would *ipso facto* warrant a denial of summary judgment and a reversal of the judgment below. Any comparison of petitioners' operations with the functions of typical commercial broadcast stations operated for profit is to assume the very point at issue here, since their respective motivations and objectives must of necessity be the controlling factors in the interpretation of the Copyright Act which this Court is asked to call before it for review.

**Reference to Debs Memorial Radio Fund Inc. v. Commissioner of Internal Revenue**

In opposition to this petition, great reliance is placed upon the case of *Debs Memorial Radio Fund Inc.* v. *Commissioner of Internal Revenue*, 3 T. C. (No. 6) 949. It should be noted that the cited case was decided by a divided court and the opinion of the majority of the Tax Court rested on the decision of the District Court below herein, of which review is asked in this petition. It is, therefore, circular reasoning for the plaintiff to argue that such a decision in the tax litigation, which is still in progress, should serve as authority herein when the very basis thereof is the subject of review in this Court.

**The Undenied Importance and Novelty of the Questions Presented for Review**

The brief in opposition to the instant petition avoids any discussion of and cites no authorities on the novel and important questions set forth in the petition.

Where a radio broadcast station has as its ultimate objects philanthropic and educational purposes and only one-third of its time is given to paid broadcasts, is a broadcast of a copyrighted musical composition on a sustaining pro-

gram (a non-commercial program bringing no revenue to the station) a public performance for profit within the meaning of Section 1(e) of the Copyright Act? This question is undeniably a question of first impression. It is novel, unique and important not only to petitioners, but undoubtedly to the general understanding and construction of the copyright law itself. Nothing in the brief in opposition indicates anything to the contrary.

The questions of law raised herein deal with the interpretation of Section 1(e) of the Copyright Act insofar as that Section applies to performances of copyrighted musical works by a broadcast station which has been found or assumed by the courts below to be non-profit as well as philanthropic and educational in character.

The brief in opposition misses the point of the instant petition to construe Section 1(e) by adverting to Section 28 of the Copyright Act, which is the provision for criminal prosecutions against willful infringers. This case concerns itself solely with civil liability for copyright infringement by public performance and involves Section 1 of the statute which sets forth the rights granted to a copyright proprietor. Section 28, which exempts charitable and educational institutions from criminal liability, has no application whatsoever to the questions of law raised herein. However, even in construing said criminal provisions the Circuit Court of Appeals for the Second Circuit, in *John Church Co.* v. *Hilliard Hotel Co., et al.*, 221 Fed. 229, at 231 (reversed on other grounds, 242 U. S. 591) interpreted the words "for profit" in Section 28 by finding that "Congress seems to have meant by the words 'for profit' a direct pecuniary charge for the performance, such as an admission fee * * *"

The reference on pages 7 and 8 of the brief in opposition to the instant petition to one of the many proposed copyright bills which was never enacted is utterly irrelevant

to the questions of law raised herein which are concerned solely with the interpretation of existing and long-enacted legislation as a matter of first impression. However, insofar as such bills may indicate a trend or tendency to allow exemptions for the performance of copyrighted works, Section 12 of S. 3043, cited on page 8 of the opposing brief, would squarely relieve petitioners of any liability for copyright infringement upon the undenied facts in this record.

It is respectfully submitted that the absence of any specific statutory exemption provision in the present Copyright Act conclusively requires an interpretation by this Court of Section 1(e) to determine its applicability to "the unlicensed broadcast of a copyrighted musical composition on a sustaining program of a non-profit station * * *" (46 F. Supp. 829, 830) whose "ultimate objects, as it has been actually conducted, have been philanthropic and educational." (141 F. 2d 852, 854)

The petition for a writ of certiorari should be granted.

Respectfully submitted,
A. Walter Socolow,
*Counsel for Petitioners.*